Supreme Court, U.S.
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No. 03-465

IN THE

Supreme Court of the United States

October Term, 2003

SABATE S.A. and SABATE U.S.A., INC.,
Petitioners,

vs.

CHATEAU DES CHARMES WINES LTD.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

The respondent Chateau des Charmes Wines Ltd. is a privately held corporation organized under the laws of the Province of Ontario, Canada. The respondent has no parent corporation, and no publicly traded company owns 10% or more of the respondent's stock.

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COUNTER-STATEMENT OF THE CASE

The respondent Chateau des Charmes Wines Ltd. respectfully requests the Court to deny the petition for writ of certiorari, seeking review of the Ninth Circuit's non-final decision in this case. That opinion is reported at 328 F.3d 528 (2003).

The Ninth Circuit's per curiam opinion does not conflict with other circuit court decisions, nor does it involve an issue of compelling significance. Rather, the decision correctly applied the United Nations Convention on Contracts for the International Sale of Goods ("CISG") to an unusual set of circumstances, reaching a result consistent with that treaty, with other decisions, and with common sense. Moreover, the Ninth Circuit decided the appeal on grounds not even discussed by the district court, and not briefed by the parties until after oral argument in the Court of Appeals.[1] Finally, the Ninth Circuit's non-final decision was correct.

Shorn of rhetoric, this case involves petitioners' effort to unilaterally impose an inconvenient forum on respondent by including – after their contract was made – a paragraph on its billing invoices, in French, directing that all disputes be resolved by a French court. The Ninth Circuit correctly held that this international sale of goods was governed by the CISG, and that the parties had reached an oral agreement on all material terms prior to any shipments. The court considered the totality of circumstances, including the lack of any prior dealings between the parties, and correctly concluded that the later billing invoices, which contained additional terms

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[1] Oral argument was held on March 31, 2003. Respondent submitted a 2-page letter brief discussing the CISG, pursuant to Ninth Circuit Rule 28-6 and Federal Rule of Appellate Procedure 28(j), on April 8, 2003. Petitioners, following an Order by the Ninth Circuit on April 17, 2003, submitted a 2-page response on April 24, 2003.

beyond those the parties had bargained,[2] did not modify that agreement. The court reasoned that "[a]dditional or different terms relating, among other things, to . . . the settlement of disputes are considered to alter the terms of the offer materially" (Pet. 5a) (citing CISG Art. 19(3)), and held that petitioners' failure to obtain respondent's assent prevented the forum selection clause from becoming part of their agreement. Thus, the court simply applied the law of the treaty to these particular facts. There is nothing to suggest the issues of the treaty's application, or the court's interpretation, are of great importance. The lack of case law on the issues proves that these issues are not significant, and petitioners' attempt to create the illusion of a conflict in authority cannot withstand scrutiny. The petition should be denied.

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[2] The billing invoice reflected accurately, in English, those terms that had been discussed and agreed upon (i.e., price, product, and quantity), but then sought unilaterally to add additional French language terms, including the disputed forum selection clause.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Question Presented in the Petition Was Not Decided by the Ninth Circuit.

The petition's sole question does not accurately reflect the issue decided by the Ninth Circuit, or presented by the record. That question as framed by the petitioners asks whether the CISG "invalidates terms set forth in a commercial invoice or letter of confirmation without regard to the practices of the parties or trade usages." However interesting that question may be, it is not the question decided by the Ninth Circuit. The court determined that the parties had reached an oral agreement that did not include any forum selection provisions, that the parties' oral agreement was complete and binding, and that the parties did not, either expressly or through subsequent dealings, modify that agreement to include a forum selection clause. (Pet. 5a-6a). The appeals court did consider the conduct of the parties, finding no prior course of dealing between the parties, and concluded that the respondent did not conduct itself "in a manner that evidenced any affirmative assent to the forum selection clause in the invoice" (Pet. 6a). The Ninth Circuit cited article 8(3) of the CISG, and found that "no circumstances exist" to indicate that respondent had made any agreement to accept the additional terms in the billing invoices. The court thus did not "invalidate" the terms of any agreement, but instead determined that the disputed clause was not part of the parties' agreement. The question "presented" was thus not decided, or even discussed, by either the Ninth Circuit or the district court.[3]

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[3] Supreme Court Rule 14.4 states that "[t]he failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the court to deny a petition."

In an effort to manufacture some conflict in authority and a question of significance, petitioners' arguments distort the record, and the Ninth Circuit's decision. This is not a case where an *order* for goods was met with a written invoice, which the purchaser acknowledged or otherwise affirmatively adopted. Nor is it a case where the parties had any *prior* course of dealing, or where trade usages were relevant to the contract. Here, as correctly found by the Ninth Circuit, the parties reached a completed oral agreement on all necessary material terms: price, amount, and payment and shipping terms.[4] "No other terms were discussed, nor did the parties have any history of prior dealings." (Pet. 2a). The billing invoices that were sent in connection with each shipment did not purport to change any agreed upon contract term. What those invoices attempted, but failed to do under CISG, was to engraft a new "material term," written in French, that specified that "any dispute arising under the present contract is under the sole jurisdiction of the Court of Commerce of the City of Perpignan." (Pet. 2a). Respondent never acknowledged this provision, never communicated with petitioners about the forum clause, and never took any action that could reasonably considered to be an affirmative assent to the clause. The court also logically and correctly held that respondent's "failure to object" to petitioners' unilateral attempt to modify the contract was not an "agreement" to the modification under CISG. The Ninth Circuit thus did consider the practices of the parties and trade usages and simply resolved the issue of assent on the specific facts and record before it.

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[4] Contrary to arguments appearing at page 14 of the Petition, to the extent that the billing invoice correctly reiterated and confirmed the parties' discussions as to the price, quantity and product, it "supported" the oral agreement as pleaded by respondent. However, this allegation does not imply or otherwise prove petitioners' argument that the billing invoice was or became the contract, or that the material additional terms could be unilaterally engrafted into the agreement by petitioners' billing invoice.

2. There Is No Conflict among the Courts of Appeals.

A. *There Is No Disagreement on Applying the CISG.*

The petitioners seek to engineer several different conflicts. At first they assert that the Ninth Circuit erred in holding that the CISG governed the question of contract formation. This claim is difficult to square with the plain language of the treaty, which provides, in Article 4, that it "governs only the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such a contract." (Pet. 21a). The Ninth Circuit expressly addressed decisions by the First and Second Circuits that reached a different result,[5] distinguishing those decisions on their facts. (Pet. 4a). Petitioners do not cite these decisions; instead, the only "conflicting" authorities cited by petitioners are law review articles, and decisions from courts in Argentina and the Netherlands. As such, there are in fact no directly conflicting opinions.

Moreover, the asserted conflicts, even if accurate, are not of significance to this Court. "A genuine conflict, as opposed to a mere conflict in principle, arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts." ROBERT L. STERN ET AL, SUPREME COURT PRACTICE, § 4.3, p. 226 (8th ed. 2002). Rule 10 recites the circumstances the Court will consider in granting a petition, and identifies conflicts between the Court of Appeals, conflicts with a decision of a state court of last resort, or situations so far "departed from the accepted and usual course of judicial

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[5] *See, Evolution Online Sys. Inc. v. Koninklijke Nederland N.V., KPN,* 145 F.3d 505, 509 (2d Cir. 1998); *Lambert v. Kysar,* 983 F.2d 1110, 1119 (1st Cir. 1993).

proceedings" that the Court should exercise its supervisory powers. Purported conflicts with foreign tribunals, or disagreements with the views of commentators, do not warrant this Court's intervention.[6]

Further, the asserted "conflict" between these foreign authorities and the Ninth Circuit's decision simply does not exist. Petitioners ignore the Ninth Circuit's clear holding that the oral agreement between the parties was completed without any discussion of dispute resolution. Contrary to petitioners' claim, the issue is not one of *interpreting or enforcing* the forum clause; as the Ninth Circuit correctly found, the billing invoice language was never a part of the parties' agreement. As such, there was no need for the court to interpret the clause, let alone determine its enforceability under existing precedent. Had the parties negotiated a forum selection as part of their completed oral agreement, doubtless the Ninth Circuit would have enforced it.

As such, it is difficult to understand petitioners' argument that this decision is in conflict with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), or the Seventh Circuit's decision in *In re Oil Spill by Amoco Cadiz*, 659 F.2d 789 (7th Cir. 1981). The fact that an arbitration clause that is clearly part of a contract should be enforced is irrelevant to the question of whether this forum selection clause was a part of the parties' agreement. The basic holding below that the CISG does not permit a party to unilaterally add additional material terms to an oral agreement without obtaining assent in no way conflicts with these cases. There is simply no conflict.

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[6] Moreover, the Eleventh Circuit decision which petitioners claim conflicts with the Ninth Circuit's substantive ruling, *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.P.A.*, 144 F.3d 1384, 1387 (11th Cir. 1998), *cert. denied*, 526 U.S. 1087 (1999), applied the CISG to a similar question of contract formation, concerning the admissibility of parole evidence. Thus, there is no conflict among the courts of appeals on this first issue.

B. *There is No Conflict on Issues of Contract Formation or Modification.*

The petitioners' next claimed conflict concerns the substance of the CISG, arguing that the Ninth Circuit's conclusion that the parties' oral agreement was not modified by later billing invoices is inconsistent with other decisions. Once again, the petitioners identify commentators and foreign tribunals as the primary sources of conflict. But whether a Swiss, Dutch, or Austrian court would reach a different result on these specific and unusual facts[7] are not questions that trigger this Court's review.[8] Similarly, the general views of commentators, no matter how well credentialed or influential, do not demonstrate a significant conflict warranting this Court's intervention. Moreover, petitioners did not argue this position below, instead relying on the assertion that the applicability of the forum selection clause was an issue of federal procedural law, without addressing how the issue would be decided under CISG.[9]

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[7] The case is "unusual" in that the parties consummated this contract in an oral agreement and had no prior history of dealings. Moreover, how and when the billing invoices were sent, and the terms reflected in each, are obviously case specific matters.

[8] While petitioners argue that the foreign decisions cited conflict with the question articulated in the petition, they do not conflict with what the Ninth Circuit in fact decided. For example, the Swiss court's determination that the terms of a seller's written confirmation, in response to a buyer's order, constituted a contract is not at odds with the decision here. *See W.T. GmbH v. P. AG.*, No. P4 1991/238 (2G Basel, Switz. Dec. 21, 1992). The German case cited, which held that the buyer had lost its right to reject the goods provided because it failed to examine the goods as required by the CISG, does not even deal with the same issues, and is in fact consistent with the Ninth Circuit's finding that there was no 'trade usage" in this case. *See* No. 1 U69/92 (Oberlandesgericht Saarbrücken (Ger.) Jan. 13, 1993). The remaining cases discussing trade usage are similarly far afield.

[9] *See* Petitioners letter to the Ninth Circuit of April 24, 2003.

Finally, petitioners' claim that a conflict exists is wrong. It relies on a mischaracterization of the facts, and of the Ninth Circuit's holding. Here the court did consider all of the relevant facts and circumstances in determining the material terms that made up the agreement. Contrary to petitioners' persistent and factually unsupported assertion, there was no prior course of dealing between the parties before the oral agreement was finalized.[10] Similarly, there was no "invalidation" of agreed upon terms by the Ninth Circuit. The invoices sent by petitioners did not alter any of the material terms already agreed upon, but instead attempted to add a new material term, written in a foreign language, to a completed agreement. The court properly concluded, after considering all of the circumstances, that respondent never agreed to the forum clause. The court did not improperly interpret, invalidate or refuse to enforce an otherwise valid forum selection clause. It may be that under a different set of facts and circumstances the terms of an invoice may be incorporated into the parties' agreement pursuant to the CISG. It may be that some commentators, or some foreign court, might weigh the facts and circumstances differently and reach a different result. But those possibilities are decidedly not a conflict sufficient to justify a grant of certiorari in this case.

Petitioners do try to create a conflict between the decision here and the Eleventh Circuit's decision in *MCC-Marble*, *supra*, n.6. Not surprisingly, the petition never explains what the claimed conflict is, stating only that the holding in that case is irreconcilable with this one. (Pet. 12). Petitioners are wrong. First, *MCC-Marble* concerned an issue of contract interpretation, not contract formation. Second, both the buyer and seller

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[10] "No other terms were discussed, nor did the parties have any history of prior dealings." (Pet. 2a)

had *signed* the written order which contained the disputed clause sought to be avoided by the buyer. In denying the seller's summary judgment motion, the Eleventh Circuit refused to apply the parole evidence rule to a question of contract interpretation, because the CISG requires a court to consider questions of the parties' intent. *MCC-Marble*, 144 F.3d at 1388. Significantly, the court noted that it was necessary to give "due consideration . . . to all relevant circumstances" in assessing the parties' intent. *Id.* at 1389. Even a cursory reading of the decision here shows that the Ninth Circuit and the Eleventh Circuit decisions are not in conflict and, indeed, involve different legal issues. Moreover, even ignoring that the legal issues are dissimilar, it is also clear that both courts conducted the same basic analysis, and reached consistent results. The Ninth Circuit did consider all of the relevant circumstances, and concluded that the parties' agreement had not been modified by the billing invoice term. There is simply no conflict with the Eleventh Circuit.

3. The Question Does Not Present an Issue of Great Significance.

Even if there were a conflict, the issue must be one of great importance to warrant review. Petitioners have come nowhere close to presenting "compelling reasons" for review of the Ninth Circuit's decision. Initially, as noted, the decision is highly fact specific. The Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). While the CISG doubtless has a role to play in international commerce, it is not this Court's role to provide a general commentary on the Treaty, or to issue advisory opinions on how it can best be implemented. As noted by the Eleventh Circuit, "[d]espite the CISG's

broad scope, surprisingly few cases have applied the convention in the United States." *MCC-Marble*, 144 F.3d at 1389. *See also Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1027-28 (2d Cir. 1995) ("There is virtually no case law under the convention").[11] It is for the courts of appeals to develop a body of law interpreting the CISG. This is not a sufficiently "important" federal matter warranting this Court's review.

4. The Ninth Circuit's Decision Is Not Final.

While the Court has jurisdiction to review interlocutory judgments, that jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Here, as in nearly all appeals from non-final judgments, the posture of the case is itself enough to warrant denial of the petition. *See, e.g., Brotherhood of Locomotive Firemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967); *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring); R. STERN, *supra*, § 4.18, at p. 258. The case may resolve itself through settlement, or on some other basis. The lack of finality counsels strongly in favor of denying the petition.

5. The Controlling Question Was Not Even Mentioned by the District Court.

A final ground for denying the petition is that the district court did not even mention the CISG, let alone base its decision to enforce the forum clause on that treaty. (Pet. 7a-17a). In contrast, here the petition's singular focus is on the CISG. The district court, after canceling oral argument and deciding the petitioners'

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[11] Further, the per curiam decision did not garner a single vote for rehearing *en banc*. (19a).

motion to dismiss on the papers, erroneously relied on the argument, first raised in their reply brief, that the parties "prior course of dealing" proved that the plaintiff consented to the French language forum clause on the billing invoices. (Pet. 12a). The district court's decision was wrong on the law, and misconstrued the material facts. Not surprisingly, the parties' briefing in the Ninth Circuit focused on the state and federal law issues discussed by the district court, and did not mention the CISG. It was only following oral argument, after the Ninth Circuit panel raised the issue, that the parties presented that court with 2 page letter briefs on the CISG.[12]

The Ninth Circuit's analysis was well-reasoned and correct. But this Court is better served when both the district court and the court of appeals have addressed the question presented by the petition, and have done so on the basis of full briefing. A petition for certiorari should not be the first time the parties fully express their positions on the question. Only in the rarest instances should this Court review a decision without the benefit of both a district court and a court of appeals opinion on the question presented. This is not one of those rare instances. The lack of a fully developed record is yet another reason why the petition should be denied.

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[12] See n.1, *supra*.

CONCLUSION

The Ninth Circuit, in finding that the parties completed oral agreement was enforceable without modification under the CISG, did not consider or decide whether the CISG "invalidates terms set forth in a commercial invoice . . . without regard to the practices of the parties or trade usages." Thus, the question presented in the petition was never decided below. Moreover, even were the question squarely presented, there is no conflict among the federal courts on the issue, and no question of sufficient importance. Moreover, the decision is not final. The petition should be denied.

Dated: Buffalo, New York
October 29, 2003

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